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No. 09-

IN THE

Supreme Court of the United States

RODREQUIS ARMANI COUNCIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Hobbs Act (18 U.S.C. § 1951(a)) prosecution of local robberies that have only a *de minimis* effect on interstate commerce is an unconstitutional exercise of federal power.

PARTIES TO THE PROCEEDING

Petitioner Rodrequis Armani Council was defendant-appellant in the Court of Appeals.

Respondent United States of America was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is reprinted in the Appendix to the Petition ("App.") at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February September 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl.3, empowers Congress to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes."

The Hobbs Act, 18 U.S.C. § 1951(a), makes it unlawful to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion."

STATEMENT OF THE CASE

Petitioner Rodrequis Council robbed $209 from the Time Out Market, a convenience store in Waynesville, North Carolina. This petition presents the question whether the federal government may prosecute under the Hobbs Act, 18 U.S.C. § 1951(a), such a local, small-scale robbery that has at most a *de minimis* effect on interstate commerce.

1. In February 2008, petitioner's 14-year old sister went missing. Desperate to find her, petitioner

decided to appear on the local television evening news by getting arrested. As a star cornerback for the University of Louisville football team, petitioner calculated that news of his arrest would reach his sister and she would return home. Accordingly, petitioner walked into the Time Out Market in Waynesville, North Carolina with a loaded 9 mm pistol. A video recorder captured petitioner pointing the gun at the cashier, demanding that she "gimme your money and be quick," and left the store with $209 and the cashier's personal cell phone. He then drove to a nearby rest area and waited. He was arrested soon after, and his arrest was widely publicized locally. *See* Statement of Facts, App. 33a-35a, and Sentencing Hearing Transcript, App. 4a-18a.

2. The federal government charged petitioner with one count of interference with commerce by robbery and one count of using and brandishing a firearm during a crime of violence. App 36a. The State of North Carolina, charged petitioner with armed robbery. App 36a-37a. Petitioner moved to dismiss the federal case on the basis that his actions had insufficient effect on interstate commerce to trigger the Hobbes Act. He argued that the robbery of $209 and a personal phone did not have the effect on interstate commerce that *United States v. Lopez*, 514 U.S. 549 (1995), requires. Other than preserving the question presented by this petition, petitioner did not contest the government's allegations. He waived his right to a jury trial.

The district court denied the motion to dismiss. App. 36a. In the court's view, "it is not arguable that armed robberies of convenience stores and other retail establishments have a considerable aggregate effect on interstate commerce." App. 40a. Further-

more, "the minimal effects standard is a well[]settled principle in the Fourth Circuit." *Id.*

Petitioner was sentenced to consecutive prison sentences of 16 months for violating the Hobbs Act and 84 months for violating 18 U.S.C. § 924(c)(1)(A)(ii), which prohibits brandishing a firearm during a "crime of violence . . . for which the person may be prosecuted in a court of the United States." Petitioner argued below, and the government has not disputed, that his § 924(c)(1) conviction cannot stand if his robbery cannot be prosecuted under the Hobbs Act. At the time that petitioner's motion to dismiss was denied, state charges remained pending in Haywood County. App. 36a-37a.

3. The Court of Appeals (Wilkinson, Shed, Duncan) affirmed. App. 1a-3a. Citing *United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003), the panel noted that the Hobbs Act's jurisdictional requirement "can be established by a minimal effect on interstate commerce." App. 2a. The panel stated that its "review of the record shows that there was sufficient evidence to establish jurisdiction to prosecute." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question about the proper scope of federal power: whether the Constitution permits the federal government to prosecute an individual who commits a local robbery which has at most a *de minimis* effect on interstate commerce. The courts of appeals are waiting for—indeed, many circuit-court judges have called for—this Court to consider whether the *de minimis* standard is justified by the Commerce Clause. This question is recurring, and this case presents a good vehicle for addressing it. The Court

should grant review.

I. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT

A. Under *Lopez* and *Morrison*, It Is Improper To Disrupt the Federal Balance By Making Local Thefts Subject to Federal Prosecution

It is well-established that our Constitution "created a Federal Government of limited powers." *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Thus, while Congress may "regulate [c]ommerce . . . among the several [s]tates," U.S. Const. art. I, § 8, cl.3, there are "outer limits" to its authority to do so, *see Lopez*, 514 U.S. at 556-57; *see also United States v. Morrison*, 529 U.S. 598, 608 (2000) (Congress' "regulatory authority [under Commerce Clause] is not without effective bounds[").

In *Lopez*, this Court surveyed the history of its jurisprudence under the Commerce Clause and "identified three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate commerce, *i.e.*, "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *see also Gonzales v. Raich*, 545 U.S. 1, 15-19 (2005); *Morrison*, 529 U.S. at 608-09.

In *Morrison*, this Court reaffirmed *Lopez*'s analytical framework and made clear that "noneconomic, violent criminal conduct" cannot be regulated "based solely on that conduct's aggregate effect

on interstate commerce." *Morrison*, 529 U.S. at 608-09, 617. As this Court previously noted, when rejecting the proposition that the Hobbs Act was intended to confer upon the federal government the authority to "polic[e] the orderly conduct of strikes," *United States v. Enmons*, 410 U.S. 396, 411 (1973), there is no indication in the Act's legislative history that Congress intended to encroach upon criminal prosecutions that had historically been the province of the states: "[n]either the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work . . . such an unprecedented incursion into the criminal jurisdiction of the States," *id.*

B. The Decision Below Conflicts With *Lopez* And *Morrison*

Petitioner stole a couple hundred dollars from a convenience store and then waited to be arrested. Although petitioner's conduct was criminal (and was being prosecuted in state court), it hardly implicates any concerns of the federal government. Under *Lopez* and *Morrison*, petitioner's crime did not have the requisite relationship to interstate commerce and should not have been federally prosecuted.

1. The panel below erroneously concluded that petitioner's crime could be federally prosecuted because the Hobbs Act contains a jurisdictional element limiting its application to crimes that "obstruct[], delay[], or affect[] commerce." 18 U.S.C. § 1951(a); *see* App. 2a. Other courts of appeals have also adopted this rationale. *See, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) ("Congress' inclusion of a jurisdictional element in the Hobbs Act addresses the *Lopez* Court's constitutional concern that congressional authority under the

Commerce Clause not become a 'general police power of the sort retained by the States'" (emphasis omitted)); *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002) ("As the Hobbs Act requires a particularized jurisdictional showing, we find *Morrison* does not affect our requirement that 'the Government need only show a "minimal" effect on interstate commerce' to support Hobbs Act jurisdiction."); *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 2006) ("Because the Hobbs Act is concerned solely with *inter*state, rather than *intra*state, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable.") (emphasis added); *United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (*Lopez*, in recognizing the "central role that a jurisdictional element can play in the valid application of a federal criminal statute, clearly does not assume that a 'substantial' effect on interstate commerce need be shown in such a setting").

But the jurisdictional element merely states that the Hobbs Act reaches only those robberies that affect interstate commerce; it says nothing about *how large an effect* the Constitution requires. *See United States v. Bishop*, 66 F.3d 569, 594 (3d Cir. 1995) (Becker, J., dissenting) ("a jurisdictional element functions only to limit the regulation to interstate activity *or* to ensure that the intrastate activity which is regulated satisfies one of the three tests of congressional power."). As the Court explained in *Lopez*, the purpose of a jurisdictional element is to

"ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." 514 U.S. at 561. *Lopez*, however, supplies no basis to conclude that Congress has "the power to provide for a *lesser* relation to interstate commerce . . . simply by including a jurisdictional provision." *United States v. McFarland*, 311 F.3d 376, 394-95 (5th Cir. 2002) (per curiam; en banc) (Garwood, J., dissenting); *see also Morrison*, 529 U.S. at 616 ("[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace"); *Lopez*, 514 U.S. at 557 ("[T]he scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local . . .") (internal quotation marks omitted); Andrew Weiss, Note, *Commerce-Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1456 (1995) ("[u]nder the 'logic' of [lower courts'] reasoning, the *Lopez* Court could have upheld § 922(q) if Congress had simply inserted a jurisdictional element into its text").

And for good reason. Under the lower courts' rationale, Congress could bring under federal control any intrastate activity that has a *de minimis* effect on interstate commerce simply by including a jurisdictional element in the statute. Almost every local crime—from loitering to vandalism—arguably has some *de minimis* effect on commerce. Thus, far from denying Congress "a 'general police power,'" *Capozzi*, 347 F.3d at 336 (quoting *Lopez*, 514 U.S. at 567), the

jurisdictional-element rationale improperly sanctions one. *See Bishop*, 66 F.3d at 596 (Becker, J., dissenting) ("majority's holding . . . permits Congress, through the inclusion of a meaningless interstate commerce provision, to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States'" (emphasis omitted)).

2. In addition to endorsing the mistaken jurisdictional-element rationale, the district court below reasoned that "armed robberies of convenience stores and other retail establishments have a considerable aggregate effect on interstate commerce." App. 40a. *Accord*, *e.g.*, *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (considering whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce"); *United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (Hobbs Act designed to "regulate[] general conduct . . . which in the aggregate affects commerce substantially").

That aggregate-effects rationale conflicts with this Court's precedent. Instead of upholding the regulation of any interstate activity that substantially affects commerce in the aggregate, "[this Court's] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis omitted); *see also id.* at 617 (Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). Most recently, in *Raich*, this Court distinguished the Controlled Substances Act from the statutes at issue in *Lopez* and *Morrison* on the ground that "the activities regulated by the CSA

are quintessentially economic." *Raich*, 545 U.S. at 25; *see also id.* at 35-36 (Scalia, J., concurring) ("In *Lopez* and *Morrison*, the Court . . . rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.").

Nothing in *Raich* suggests that robbery is within the class of activity that may be aggregated for purposes of Commerce Clause analysis. *Raich* held that Congress could regulate the purely local production of a commodity—marijuana—even when it was "not produced for sale" because the "failure to regulate that class of activity would [have] undercut the regulation of the interstate market in that commodity." 545 U.S. at 18. As Justice Scalia explained in his concurrence, while Congress' power "'to make . . . regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct." *Id.* at 37 (Scalia, J., concurring); *cf. Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

The Hobbs Act is not like the statutory provision at issue in *Raich*. It is not part of a comprehensive regulatory scheme comparable to the CSA. *See, e.g.*, *Harrington*, 108 F.3d at 1476 (Sentelle, J., dissenting) ("Congress did not undertake a general regulatory scheme of armed robberies."). Moreover, robbery of a few hundred dollars is not "commercial" in the "ordinary and usual sense of that term." *See, e.g.*, *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)

(Gun Free School Zones Act "regulat[ed] an activity beyond the realm of commerce in the ordinary and usual sense of that term"). The term "commerce" is used to refer to "[b]uying and selling; the exchange of merchandise or services, esp. on a large scale." 1 New Shorter Oxford English Dictionary 451 (1993); *see also* Merriam-Webster's Collegiate Dictionary 231 (10th ed. 1997) ("the exchange or buying and selling of commodities, esp. on a large scale and involving transportation from place to place").

Of course, robbery does have an economic effect on the entity or individual robbed. But concluding that every robbery of a business affects interstate commerce requires assumptions about how that business would have used the money. When a robbery depletes the assets of a business engaged in interstate commerce, the depletion will not have even a *de minimis* effect on interstate commerce unless that depletion actually alters interstate purchasing decisions. There is no reason to believe, and no evidence on the record, that a $209 robbery did or was likely to do that. Additionally, the actual money stolen from a robbery may immediately be used to purchase other goods that have also moved in interstate commerce (as most have). Concluding that robbery affects interstate commerce (as opposed to the entity or individual robbed) requires assumptions about how the money would have been used by the true owner, as well as how it will be used by the person who stole it. Inquiring only as to whether a business's assets were depleted wrongly displaces the question of whether interstate commerce was affected.

The courts of appeals have nevertheless relied on purely speculative theories about commerce to affirm

convictions under the Hobbs Act. For example, the Third Circuit affirmed a Hobbs Act conviction of a defendant who had stolen personal property from a local chiropractor's office, explaining that because the acts had taken place "in [a] place of business" the nexus was met. *United States v. Rutherford*, 236 F. App'x 835, 841-42 (3d Cir. 2007). By showing that the business ultimately purchased a safer door and the "morale" of the staff was affected, the court found that the government had provided sufficient proof of a "potential effect" on interstate commerce. *Id.* at 842-43 (citing *United States v. Urban*, 404 F.3d 754, 767 (3d Cir. 2005)). Judges Ambro and McKee, concurring, wrote that "[b]y prosecuting [the defendant] at the federal level, the Federal Government . . . has overridden the default state criminal system in what looks like a classic state-law crime." *Rutherford*, 236 F. App'x at 845. In a similarly attenuated case, the Third Circuit confirmed a Hobbs Act conviction of a defendant who had merely attempted to rob a local grocery store. *United States v. Reyes*, No. 08-4783, 2010 U.S. App. LEXIS 1790 (3d Cir. Jan. 27, 2010).

Another recent example of the courts of appeals' expansive view of the Hobbs Act is *United States v. Rivera-Rivera*, 555 F.3d 277 (1st Cir. 2009), which affirmed the conviction of a defendant who robbed a lottery store in Puerto Rico. Judge Lipez dissented in part and asserted that "the [*de minimis*] standard cannot be applied so loosely that the interstate commerce element no longer serves to distinguish between federal and state crimes." *Id.* at 298. "Otherwise," he cautioned, "we risk turning every routine robbery into a federal offense." *Id.* As the majority had based its decision on the possible "future re-

placement" of "screens, cables and games," Judge Lipez remarked that the majority had reduced "the [*de minimis*] concept to a meaningless verbal incantation" that would enable "the Hobbs Act [to] embrace virtually all local robberies." *Id.* at 295, 298.

This case illustrates that the federal government is taking full advantage of the expansive local policing authority granted to it by the courts of appeals. Here, the government claimed that petitioner's robbery affected interstate commerce because goods that were present in the store had travelled in interstate commerce. App. 33a. But petitioner did not steal any of these goods. This is substantial interstate affect by osmosis. It shows the lengths to which the government is routinely ignoring any limit whatsoever to the local reach of the Hobbs Act.

In *Morrison*, this Court rejected reliance on assumptions and attenuated chains of causation in establishing an effect on interstate commerce, recognizing that "but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. . . would allow Congress to regulate *any* crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." 529 U.S. at 615 (emphasis added). The federal prosecution of petitioner under the Hobbs Act for a purely local theft contravenes this Court's precedent.

II. NUMEROUS COURTS OF APPEALS JUDGES HAVE CALLED UPON THIS COURT TO RESOLVE THE QUESTION PRESENTED

In the years since *Lopez* was decided, every court of appeals has considered whether the *de minimis* standard remains constitutional following *Lopez*.[1] In every circuit, it is now settled that the *de minimis* standard is the appropriate analytical framework for assessing challenges to Hobbs Act convictions.

The apparent unanimity is deceptive. Often, courts of appeals have declined to disturb pre-*Lopez* precedent while requesting further guidance from this Court. On this view, even if the circuit's interpretation of the Hobbs Act conflicts with *Lopez* and *Morrison*, the circuit will not act absent instruction from this Court.

For example, Judge Torruella of the First Circuit, concurred in a decision affirming the conviction of a robbery of an individual in his private residence even though he believed that the majority's "interpretation of the Hobbs Act . . . extends Congress' power to regulate interstate commerce beyond what

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[1] *See, e.g.*, *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006); *United States v. Farrish*, 122 F.3d 146 (2d Cir. 1997); *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003); *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003); *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc); *United States v. Davis*, 473 F.3d 680 (6th Cir. 2007); *United States v. Peterson*, 236 F.3d 848 (7th Cir. 2001); *United States v. Dobbs*, 449 F.3d 904 (8th Cir. 2006); *United States v. Atcheson*, 94 F.3d 1237 (9th Cir. 1996); *United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000); *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997).

is authorized by the Constitution." *United States v. Jimenez-Torres*, 435 F.3d 3, 13 (1st Cir. 2006) (Torruella, J., concurring). He believed he had "no choice" but to follow circuit precedent until "the Supreme Court puts an end to the fictions that allow the apparently limitless aggrandizement of federal power into areas reserved to the states by the Constitution." *Id.* at 15.

Similarly, in the Sixth Circuit, Judge Suhrheinrich concurred because "the majority's decision is consistent with the law of this Circuit." *Baylor v. United States*, 517 F.3d 899, 903 (6th Cir. 2008) (Suhrheinrich, J., concurring). He further explained, however, that this result conflicted with *Lopez* and *Morrison* and could not be "what the Founding Fathers intended." *Id.* at 904. He thus expressed the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." *Id.*

Judges of the Seventh Circuit have also suggested this Court consider the question presented. *See United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002) ("We are bound by the ample Seventh Circuit precedent on this point. If, indeed, *Lopez*'s rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold.").

To be sure, numerous court of appeals judges have urged that their circuit not wait for this Court to act. For example, eight Fifth Circuit judges joined a dissent arguing that the *de minimis* standard conflicts with this Court's precedent. *See McFarland*, 311 F.3d 377-410 (Garwood, J., dissenting from per curiam). *McFarland* affirmed, by an equally divided en banc court, the defendant's conviction of four

counts of Hobbs Act robbery for robbing three convenience stores and a liquor store. In one of the robberies, the defendant had stolen "about $50." *Id.* at 377-78. Although the eight judges who voted to affirm the conviction provided no rationale for their decision, eight judges dissented, forcefully arguing that the Hobbs Act cannot be constitutionally applied to the robbery of local retail stores. *Id.* at 396.

Similarly, in *Harrington*, Judge Sentelle dissented from the D.C. Circuit's court's application of the *de minimis* standard. He explained that "[t]he Supreme Court's majority opinion in *Lopez*, especially in light of the concurring language of three justices" led him "to believe that the United States' broad interpretation of the Hobbs Act robbery statute is directing us toward constitutionally dangerous ground." 108 F.3d at 1476. He further explained that a "'relatively trivial effect [if any] on commerce' should not be used as an excuse for the broad federalization of an otherwise state-governed crime." *Id.*

At this point, more than a decade after *Lopez*, there is no reason for this Court to postpone considering the Hobbs Act in light of *Lopez* and *Morrison*. There is fundamental disagreement in the courts of appeals as to how the test this Court set forth in *Lopez* should be applied in Hobbs Act cases. The circuit courts have continued to follow their pre-*Lopez* precedent only because many judges feel compelled to vote against their better judgment. This Court should relieve them of that burden.

III. THE CASE PRESENTS A GOOD VEHICLE FOR ADDRESSING THIS RECURRING ISSUE

The factual scenario raising the question at issue is recurring. As the cases discussed above indicate, the federal government repeatedly prosecutes individuals whose criminal activity has, at best, a *de minimis* effect on interstate commerce. Moreover, because the courts of appeals have all weighed in on this question, and there is internal division in at least four circuits, there are lengthy opinions that articulate all the various competing arguments. There is thus no need to wait for additional appellate consideration of the question.

Finally, this case is a particularly good vehicle to clarify the proper application of *Lopez* and *Morrison* in the federal criminal context. This question, *i.e.*, whether the *de minimis* standard survives *Lopez* and *Morrison*, was squarely presented below, so there is no concern about waiver. There are no other legal issues that could complicate the analysis. There was no jury trial and the evidence is not disputed. The state criminal charges against petitioner were pending when the district court ruled, illustrating that the federal government overrode "the default state criminal system in what looks like a classic state-law crime." *Rutherford*, 236 F. App'x at 845.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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February 5, 2010

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-5186

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RODREQUIS ARMANI COUNCIL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (1:08-cr-00036-LHT-DLH-1)

Submitted: August 12, 2009 | Decided: September 10, 2009

Before WILKINSON, SHEDD, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Claire J. Rauscher, Executive Director, Raquel K. Wilson, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Asheville, North Carolina, for Appellant. Edward R. Ryan, Acting United States Attorney, Adam Morris, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Rodrequis Armani Council was convicted of interfering with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951 (2006), and use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (2006). The district court sentenced Council to 100 months' imprisonment. Council timely appealed, challenging the constitutionality of the Hobbs Act as applied to his case.

The Hobbs Act contains a jurisdictional element requiring a case-by-case determination regarding whether the defendant's conduct impacted interstate commerce. This jurisdictional requirement can be established by a minimal effect on interstate commerce. See 18 U.S.C. § 1951(a) (2006); United States v. Williams, 342 F.3d 350, 354 (4th Cir. 2003). Our review of the record shows that there was sufficient evidence to establish jurisdiction to prosecute.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

UNITED STATES OF AMERICA	DOCKET NO. 1:08CR36
vs.	
RODREQUIS ARMANI COUNCIL	

TRANSCRIPT OF SENTENCING PROCEEDINGS BEFORE THE HONORABLE LACY H. THORNBURG UNITED STATES DISTRICT COURT JUDGE NOVEMBER 20, 2008

On Behalf of the Government:

Corey F. Ellis, Assistant U.S. Attorney
United States Attorney's Office
Suite 1700, Carillon Building
227 West Trade Street
Charlotte, North Carolina 28202

On Behalf of the Defendant:

Raquel Wilson, Assistant Federal Defender
Federal Defenders of Western North Carolina
1 Page Avenue, Suite 210
Asheville, North Carolina 28801

PROCEEDINGS

THE COURT: We now call the case of United States of America vs. Rodrequis Armani Council. Is the defendant ready to proceed, Ms. Wilson?

MS. WILSON: Yes, Your Honor.

THE COURT: And the government, Mr. Ellis?

MR. ELLIS: Yes, Your Honor.

THE COURT: All right. Will the defendant stipulate that there is a factual basis to support the plea of guilty entered in this case and, further, that the Court may accept the evidence contained in the Presentence Investigation Report as establishing such a factual basis, subject to the corrections shown on defendant's response?

MS. WILSON: Actually, no, Your Honor. This was a stipulated bench trial, and I argued a Rule 29 motion, and the Court found Mr. Council guilty. So we have nothing further to add in terms of argument on guilt in the case because of the Court's finding, but the presentence report facts should not have any impact on the bench trial that we conducted. So we don't have further objections to the report, but we maintain the argument we made in our Rule 29 motion.

THE COURT: All right. I note here – I was taking these as corrections, that paragraph 45, defendant graduated from high school; paragraph

64, defendant is entitled to a variance; and also reference to breaking, entering, larceny charges were dismissed after deferred prosecution. So then I accept those notes for the Court's consideration.

And the government has no objections?

MR. ELLIS: You're correct, Your Honor.

THE COURT: All right. Then the Court will find that there is a factual basis to support the plea of guilty entered in this case and, further, that – well, I will leave it at that.

All right. I'll recognize you to proceed then, Ms. Wilson.

MS. WILSON: Thank you, Your Honor. And I do thank the Court for the Court's indulgence; I did file voluminous documents in this case. And given that the Court has reviewed those, I certainly won't ask much more of the Court's indulgence in that regard.

But I will say, first of all, that there are a number of people present in the courtroom today. And, of course, I made them all aware that we will not be having further testimony as far as Mr. Council's character today at sentencing and that the Court has been served with a copy of all of their letters and that the Court has reviewed those.

But just so the Court is aware, pretty much this entire row, that's the second row from the front, are people here to support Mr. Council, including an uncle, an aunt, a girlfriend, his grandmother and

mother, his father is here, and three personal friends.

And just to put all of this – all of these voluminous filings in perspective, I'm well aware that the Court is without discretion on Count Two in terms of the seven-year minimum mandatory for brandishing a firearm, and so the indulgence that I'm asking for is really quite small, given the fact that the seven years are non-discretionary.

The range on the robbery count for which he was convicted after the stipulated bench trial is 27 to 33 months, and so if the Court were satisfied that a seven-year minimum mandatory on the gun count is sufficient and not greater than necessary to punish Mr. Council for his conduct, then the Court could certainly give a variant sentence on Count One. I would certainly leave that to the Court's discretion as far as how much lower than the advisory range to go. But I think it's extremely rare – it certainly has been rare in my career, and I think I'm safe to assume that it's rare in the Court's career – that a person in this circumstance receives, as the Court in *Gall* put it, a small flood of support letters. The guidelines say that for this kind of crime there is no such departure for aberrant behavior or diminished capacity or anything else. I mean, the guidelines themselves make all of this information irrelevant. But my point in filing the sentencing memorandum was that the Supreme Court has said in no uncertain terms that if the Court desires to sentence a person under the guidelines – or rather lower than the recommended sentence, the Court is free to do that for any reason, including simply disagreeing with the guidelines policy statements. And it

certainly wouldn't be my first time saying that I certainly disagree with the guidelines policy statements that all of the things that we know really make a difference in a person's life are irrelevant for sentencing purposes. It's not the first time I'll say it, it's not the last time I'll say it, but I think that's just wrong. And the Supreme Court has recognized that it's wrong and they said that courts – and I'm talking about *Gall* and *Kimbrough* in particular – that courts can look to all factors about the person, circumstances surrounding the offense, circumstances about the person in determining a sentence, and if the Court agrees that, for example, in a case like this, diminished capacity or aberrant behavior apply, or just that this is the kind of person who should serve only seven years as opposed to nine or ten, that the Court can do that. And so that was the point of filing the sentencing memorandum and citing that law.

As far as the letters, the support letters are concerned, all I can say is in all respects Mr. Council has shown himself to be responsible, talented, generally a bright and happy person, a leader on his team. I'm not going to lie and say that I'm a big fan of football, but when I see reports about the college draft or I see the Green Bay Packers play just the other night, it's a heart-break for me. Obviously, I don't know Mr. Council personally, I just met him as a result of this case, but one of our first letters here is from the coach of the Green Bay Packers, and Mr. Council would have been drafted and he would have been a top draft pick.

The irony is, you know, his family is here for support. And I'm not trying to blame anybody. His

family is here now, but at the same time, I think, you know, because – in part, because of Mr. Council's tremendous talent, everyone was looking to him to be their savior. His sister was looking to him to be the father she didn't have, his mother was looking to him to be the husband that she didn't have, to be the financial supporter, all of those things, and I think that at some point it really was just too much for him.

And, as I say, the Court's discretion in this is very limited. I'm not standing here asking for probation. I recognize that a seven-year sentence is mandatory. But what I'm saying is that under all the circumstances in this case, including the fact that immediately after committing the offense he drove up to the next rest area, the Tennessee rest area, and simply waited for the police to arrest him.

And I'm not sure if it's in – I didn't get the arresting officer to write a letter on his behalf because normally they don't do that, but I can tell you that from the beginning of this case, when we started investigating, the investigating officer said this was one of the most polite young men he'd ever of met and he just couldn't believe that this person was involved in this; and then on the ride back to North Carolina, when the officer asked him, you know, why did you do this, Mr. Council just hung his head.

And so for all of those reasons, I'm submitting that a seven-year sentence is sufficient.

THE COURT: All right. Does defendant wish to address the Court?

THE DEFENDANT: Yes, Your Honor.

First of all, I'd like to thank God, who is the head of my life today, and I'd also give my respect to you, Judge Thornburg, prosecuting attorney, Mr. Corey Ellis. I want to thank my attorney Ms. Raquel Wilson and her staff. They worked really hard for me. Lastly, I'd like to thank my family for just being my backbone, being my support, you know.

And I just want to say I'm a child of God, you know, Your Honor, and I've always been a young man of great faith. This was a point in time in my life where I just kind of let all the external factors, you know, outweigh my decision-making and I let my emotions really alter my faith, and I made a mistake. I know it's not life-threatening, but it was a big mistake.

I'm not asking you to feel sympathetic towards me or anything like that, but I am asking you man-to-man to just have mercy on me today, and thank you and God bless.

THE COURT: All right. Mr. Ellis?

MR. ELLIS: Your Honor, the government respectfully disagrees with the position taken by Ms. Wilson on behalf of her client in this case. The government would argue that a variance from the guideline range would be unreasonable when considered in light of the factors under 3553. This young man has many more tools of self control, has a much more viable support structure than most of the individuals who come before this Court. He has a lot of talent that is evidenced in this very detailed

briefing that Ms. Wilson has done for you and that you can see in the presentence report. He has demonstrated an ability to comport his conduct to the strictures of society at the highest level, and then, on this occasion, he did the reverse of that.

It's important, Your Honor, to point out that he has got the tools to conduct himself appropriately and that despite this knowledge and this ability he throws that out the window and walks into a convenience store with a loaded 9mm pistol and points it at the head of a young lady for $200. And he did so, Your Honor, in premeditated fashion.

If you read the factual basis that's set forth in the presentence report, as well as in his own psychologist's notes, he had retrieved this weapon with an obliterated serial number a week in advance in effort to locate his sister. So he had had at least that period of time to think about what it was he was doing traveling about the Western District of our state with a loaded firearm in his possession. Despite all of these tools, he takes it upon himself to endeavor in this action.

If that weren't remarkable enough, Your Honor, I want to point you to page 6 of the presentence report that indicates that in 2004 Mr. Council received the benefit of a deferred prosecution in state court. So all that to say that not only did this young man have many more tools than most, but he had the benefit of experience in this regard. He had the benefit of having been given the indulgence of a court previously in 2004, and despite that previous indulgence, Your Honor, here we are today.

So I submit to the Court, Your Honor, I'll be succinct, that under 3553, when you look at all those factors and consider the need to deter others, the need to protect the public, the need to let others similarly situated see what the results of such criminal conduct could be, that a sentence within the guideline of 27 to 33 months in addition to the seven-year statutory minimum is reasonable.

Your Honor, he's received mercy of the Court in the past. I submit to you that in his statements to the Court, and he gave several direct handwritten statements that were artfully drafted, most of those were centered around the reason that you should give him mercy. He has not sufficiently answered the question why he would in this instance take the Court up on mercy and not do it again when, in 2004, he was given the same sort of indulgence that he asks for today.

So it's our argument, Your Honor, that a variance from these advisory guidelines would not be reasonable in light of all those factors under 3553.

(Pause in the proceedings.)

THE COURT: All right. The Court, after a thorough review of the Presentence Investigation Report as well as supporting documentation provided by defense counsel as to defendant's background and history, and taking into consideration his age, as well as the substantial period of time required for incarceration under Count Two, a consecutive sentence requirement, the Court finds that in its discretion and in this case an offense level of 14 is appropriate, with a guideline

range of 15 to 21 months, and from this guideline range, under offense level 14, the Court determines that a term of 16 months is appropriate.

All right. Pursuant to the Sentencing Reform Act of 1984 and U.S. vs. Booker, it is the judgment of the Court, having considered the factors noted in 18 U.S.C., Section 3553(a), that the defendant, Rodrequis Armani Council, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 16 months on Count One and a term of 84 months on Count Two, to be served concurrently to the term imposed in Count One, for a total term of 100 months.

The Court calls to the attention of the custodial authorities that the defendant has a history of substance abuse and recommends that he be permitted to participate in any available substance abuse treatment program while incarcerated.

Excuse me. Mr. Ellis?

MR. ELLIS: Your Honor, I believe that under 18 U.S.C. 924(c) that there is a requirement that that time be consecutive. I believe that the word "consecutive" is expressly set forth in the statute.

THE COURT: I ordered consecutive.

MR. ELLIS: I heard "concurrent," but I could be incorrect, Your Honor.

MS. WILSON: Your Honor, the Court did say "concurrent," but then the Court added it up for a consecutive sentence.

THE COURT: 84 and 16, 100, and that has to be consecutive. If I said "concurrent," then strike "concurrent" and make it consecutive.

MR. ELLIS: Thank you, Your Honor.

THE COURT: Yes. I think we all agree that a consecutive sentence is required. And, if eligible, that he receive the benefit of 18 U.S.C. §3621(e)(2).

The Court calls to the attention of the custodial authorities that the defendant has a history of mental health issues and recommends that he be allowed to participate in any available treatment program – mental health treatment programs while incarcerated, if recommended, after an evaluation by a mental health professional.

It is further ordered that defendant be required to support all dependents from prison earnings while incarcerated, as outlined in the presentence report.

The Court recommends that defendant be allowed to participate in any educational and vocational opportunities while incarcerated.

Upon release from imprisonment, defendant shall be placed on supervised release for a term of 3 years. This term consists of 3 years on Counts One and Two, each term to run concurrently. Within 72 hours of release from the custody of the Bureau of

Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall comply with the standard conditions that have been adopted by this Court in the Western District of North Carolina and shall comply with the following additional conditions:

If recommended by a mental health expert, the defendant shall submit to a mental health evaluation and any recommended treatment program under the guidance and supervision of the U.S. Probation Office. If recommended, the defendant shall remain in treatment and maintain any prescribed medications until satisfactorily discharged by the program and/or with the approval of the U.S. Probation Office.

It is further ordered that defendant shall reimburse the United States for court-appointed attorney's fees.

It is further ordered that the defendant shall make restitution to the Time Out Market, Waynesville, North Carolina, in the amount of $209.81 by release of the money seized from the defendant at the time of his arrest.

It is further ordered that defendant shall pay to the United States a special assessment of $200.

The Court finds the defendant does not have the ability to pay a fine or interest and waives the payment of fine and interest in this case.

Payment of the criminal monetary penalties shall be due and payable immediately.

The Court has considered the information contained in the presentence report concerning the defendant's financial resources and assets, financial obligations, projected earnings, other income, age, education, health, dependents, and work history and finds the following is feasible:

If the defendant is unable to pay any monetary penalty immediately, during the period of imprisonment payments shall be made through the Federal Bureau of Prisons Inmate Financial Responsibility Program. Upon release from imprisonment, any remaining balance shall be paid in monthly installments of no less than $50, to commence within 60 days after release from imprisonment, until paid in full.

Throughout the period of supervision, the probation officer shall consider the defendant's economic circumstance as it pertains to the defendant's ability to pay any monetary penalty ordered and shall notify the Court of any material changes, with modifications recommended as appropriate.

Now, Mr. Council, you have a right to appeal this sentence to the Fourth Circuit Court of Appeals.

If you choose to do so, you must file a written notice of appeal with the clerk of this court within a period of ten days following the date of entry of final judgment in your case.

If you choose to appeal but do not have the funds with which to appeal, you may appeal at government expense, having previously been determined to be indigent.

Do you understand that right of appeal as I just explained it to you?

THE DEFENDANT: Yes, sir.

THE COURT: That will complete the hearing.

MS. WILSON: Thank you, Your Honor.

THE COURT: Yes.

(End of proceedings.)

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I certify that the foregoing transcript is a true and correct transcript from the record of proceedings in the above-entitled matter.

Dated this 15th day of January, 2009.

s/ Karen H. Miller
Karen H. Miller, RMR-CRR
Official Court Reporter

APPENDIX C

United States District Court
For the Western District of North Carolina

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
v.	
Rodrequis Armani Council	Case Number: DNCW108CR000036-001
	USM Number: 22041-058 Raquel K. Wilson Defendant's Attorney

THE DEFENDANT:

___ Pleaded guilty to count(s) .
___ Pleaded *nolo contendere* to count(s) which was accepted by the court.
_x_ was found guilty on count(s) 1, 2 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature and Offense	Date Offense Concluded	Counts
18:1951	Interference with Commerce by Robbery	2/20/08	1
18:924(c)(1)(A)(ii)	Carry and Use a Firearm During and in Relation to a Crime of Violence	2/20/08	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S. Ct. 738 (2005), and 18 U.S.C. § 3553(a).

___The defendant has been found not guilty on count(s).

___Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States

attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 11/20/08

Lacy H. Thornburg
United States District Judge

Date: December 4, 2008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 16 months on Ct. 1 and a term of 84 months on Ct. 2, to be served consecutively to the term imposed on Ct. 1, for a total term of 100 months.

X The Court makes the following recommendations to the Bureau of Prisons:

- be allowed to participate in any available substance abuse treatment programs while incarcerated and if eligible receive benefit of 18 U.S.C. § 3621(e)(2).
- be allowed to participate in any available mental health treatment programs, in recommended after an evaluation by a mental health professional.
- be required to support all dependants from prison earnings as outlined in the Presentence Report.
- be allowed to participate in any education and vocational opportunities.

X The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ At _____ On _____.
__ As notified by the United States Marshal.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ Before 2 pm on .
__ As notified by the United States Marshal.
__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____To _____
_____At _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of terms of 3 years on each of Cts. 1 and 2, such terms to run concurrently.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.

5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised

release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location

verification system program based upon your ability to pay as determined by the probation officer.

24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

25. If recommended by a mental health expert, defendant shall submit to a mental health evaluation/treatment program under the guidance and supervision of the U.S. Probation Office. If recommended, defendant shall remain in treatment and maintain any prescribed medications until satisfactorily discharged by the program and/or with the approval of the U.S. Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$200.00	$0	$209.81

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

_X_ The interest requirement is waived.

___ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

_X_ The defendant shall pay court appointed counsel fees.

___ The defendant shall pay $_____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ___ Lump sum payment of $ _____ Due immediately, balance due
___ No later than _____, or
___ In accordance ___ (C), ___ (D) below; or

B X Payment to begin immediately (may be combined with ___ (C), X (D) below); or

C ___ Payment in equal ___ (e.g. weekly, monthly, quarterly) installments of $ _____ To commence _____ (e.g. 30 or 60 days) after the date of this judgment;

D X Payment in equal monthly (e.g. weekly, monthly, quarterly) installments of $ 50 To commence 60 (e.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate. 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court costs:

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 309 U.S. Courthouse, 100 Otis Street, Asheville, NC, 28801, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

RESTITUTION PAYEES

The defendant shall make restitution to the following payees in the amounts listed below:

NAME OF PAYEE	AMOUNT OF RESTITUTION ORDERED
The Time Out Market, Waynesville, NC	$209.81

__ The defendant is jointly and severally liable with co-defendants for the total amount of restitution.

__ Any payment not in full shall be divided proportionately among victims.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

UNITED STATES OF AMERICA	DOCKET NO. 1:08CR36
vs.	
RODREQUIS ARMANI COUNCIL	

STATEMENT OF FACTS

Were this matter to go to trial, the United States of America would prove the following facts beyond a reasonable doubt:

1. On or about February 20, 2008 the defendant walked into the Time Out Market located at 5279 Jonathan Creek Road, Waynesville North Carolina in Haywood County which is within the Western District of North Carolina, with a fully operational loaded 9mm pistol with intent to commit robbery. A video recorder in the store captured his image coming into the store on two occasions. The Time Out Market is located just off of exit 20 of U.S. Interstate 40. Time Out Market is a convenience store which stocks numerous items which have traveled in interstate commerce. Mr. Council entered the store two times on February 20. In his first visit, which was also captured on video tape, Mr. Council purchased a "Red Bull" drink and a "Black and Wild" cigar. After the defendant entered the store for the

second time he pointed the gun at the cashier and demanded that she, "gimme me your money and be quick." The defendant intended by pointing the loaded gun at the cashier to threaten her and steal from the store. The cashier took all the paper money from the cash register and placed it into a brown paper bag and handed the bag to the defendant. The defendant then demanded the cashier's cell phone which she handed to him. The defendant then left the store, got into his 2008 Chevrolet Impala automobile and traveled in the direction of Interstate 40.

After the defendant had left the Time Out Market, the cashier activated the store's silent alarm to report the robbery. Authorities placed a Be On Look Out "BOLO" order for the person and vehicle the cashier had described. Later on February 20, 2008, troopers with the Tennessee Highway Patrol advised that they had located the defendant and the 2008 Chevrolet Impala at the Tennessee welcome center rest area near mile marker #447 adjacent to U.S. Interstate 40. The defendant was inside the vehicle and in possession of items stolen from the Time Out Market. He was also in possession of clothing seen on the video camera and the cashier's cell phone.

Defendant's Signature: After consulting with my attorney, I, RODREQUIS ARMANI COUNCIL, hereby stipulate that the above Statement of Facts is true and accurate, and that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

/s/ Rodrequis Armani Council 7/1/08
RODREQUIS ARMANI COUNCIL
Defendant

Defense Counsel's Signature: I am the attorney for RODREQUIS ARMANI COUNCIL. I have carefully reviewed the above Statement of Facts with him. To my knowledge, his decision to stipulate to these facts is an informed and voluntary one.

/s/ Raquel Wilson 7/1/08
Raquel Wilson
Assistant Federal Defender
Counsel for Defendant

APPENDIX E

**IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION**

CRIMINAL NO. 1:08CR36

UNITED STATES OF AMERICA	)	
	)	
	)	
VS	)	**MEMORANDUM AND ORDER**
	)	
RODREQUIS ARMANI COUNCIL	)	

THIS MATTER is before the Court on Defendant's motion to dismiss the indictment herein. For the reasons stated below, Defendant's motion is denied.

I. FACTUAL AND PROCEDURAL HISTORY

In February 2008, Defendant allegedly robbed the Time Out Market, a convenience store in Waynesville, North Carolina. Based on this event, he was indicted on one count of interfering with commerce by robbery in violation of 18 U.S.C. § 1951(b)(3), and one count of using and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). **Bill of Indictment, filed April 1, 2008, at 1-2.** State charges for armed

robbery are also pending against Defendant in Haywood County. ***See* Motion to Dismiss Bill of Indictment, filed June 16, 2008, at 13.** Defendant's federal trial is scheduled for this Court's July term. On June 16, 2008, Defendant moved for dismissal of his indictment, arguing that 18 U.S.C. § 1951 is unconstitutional.[1] *Id.* at 2-13.

II. ANALYSIS

Title 18 U.S.C. § 1951, known as the Hobbs Act, provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 1951(a). The statute also defines "commerce" as, essentially, interstate commerce.

The Commerce Clause in Article I, Section 8 of the Constitution gives Congress plenary authority to regulate (1) "the use of the channels of interstate

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[1] Section 924(c)(1)(A) prohibits using a firearm "in relation to an crime of violence . . . for which the person may be prosecuted in a court of the United States." Thus if Defendant's first charge is dismissed, the firearms charge, as well, will no longer be viable.

commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce." ***United States v. Lopez*, 514 U.S. 549, 558-59 (1995).** "Congress exercised the full extent of this authority in the Hobbs Act, which 'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by . . . robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" ***United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003) (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)).**

The Act "does not require proof that a defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions." ***Id.*** Also, because of the breadth of § 1951's language, the Fourth Circuit, along with many other circuits, has "found the Hobbs Act to apply whenever the instant offense has at least a 'minimal' effect on interstate commerce." ***Id.* (quoting *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976); *see also United States v. Marrero*, 299 F.3d 653, 654-56 (7th Cir. 2002); *United States v. Jamison*, 299 F.3d 114, 118 (2d Cir. 2002); *United States v. Smith*, 182 F.3d 452, 456 (6th Cir. 1999); *United States v. Robinson*, 119 F.3d 1205, 1208 (5th Cir. 1997); *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997); *United States v. Atcheson*, 94 F.3d 1237, 1241-43 (9th Cir. 1996).** The Fourth Circuit

reaffirmed the so-called "minimal effects standard" as recently as last year. ***United States v. Ware*, 230 F. App'x 249, 253 (4th Cir. 2007)** ("Although Ware maintains that a substantial effect on interstate commerce must be shown for a robbery to be prosecuted under the Hobbs Act, we have consistently recognized otherwise, holding that a 'minimal effect' is sufficient.").

Defendant concedes that the minimal effects standard is the controlling precedent in this jurisdiction. **Motion to Dismiss, *supra*, at 2 n.1 (acknowledging that Fourth Circuit law may "foreclos[e] this issue").** Nonetheless, he argues that the minimal effects standard violates *Lopez*, which holds that "Congress may not 'use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.'" ***Id.* at 4 (quoting *Lopez*, 514 U.S. at 558).** According to Defendant, the circuit courts' broad reading of § 1951 unconstitutionally permits the Government to obtain a conviction even when it can only prove, "at best, a trivial impact on interstate commerce." ***Id.*** "The same test," Defendant maintains, "would also allow prosecutions where a robbery involved a popsicle, a pack of gum, or a dime." ***Id.***

Defendant's argument, however, is misplaced. The Eleventh Circuit has noted that the Hobbs Act was designed specifically to "regulate[] general conduct – robberies and extortion – which *in the aggregate* affects commerce substantially." ***United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (emphasis added).** Because the focus is on the *aggregate* effects, "an *individual* defendant's conduct need not substantially affect commerce" in

order to incur liability under § 1951. ***Id.* (emphasis added).** Accordingly, the *Guerra* Court concluded that the Hobbs Act could be applied to a defendant who robbed an Amoco service station and absconded with about $300.00 in cash. ***Id.; see also United States v. Paredes*, 139 F.3d 840, 841-45 (11th Cir. 1998) (holding that a total of $170.00 taken from two local stores was sufficient to meet § 1951's jurisdictional requirement).** The facts of *Guerra* and *Paredes* are quite similar to those in this case where Defendant is accused of stealing $209.81 from a convenience store. While it is perhaps arguable whether the theft of some $200.00 in cash significantly affects interstate commerce, it is not arguable that armed robberies of convenience stores and other retail establishments have a considerable aggregate effect on interstate commerce. For these reasons, the undersigned believes that the minimal effects standard – as set forth in *Williams*, *Ware*, and their ilk – fully accords with *Lopez* . Moreover, the minimal effects standard is a wellsettled principle in the Fourth Circuit and, therefore, is binding on this Court. Accordingly, Defendant's motion has no merit.

III. ORDER

IT IS, THEREFORE, ORDERED that Defendant's motion to dismiss his indictment is hereby **DENIED**.

Signed: June 23, 2008

Lacy H. Thornburg
United States District Judge